HERMANN SUERKEN GMBH & CO.

v.

SELCO (SHIPYARD) PTE. LTD.

HIGH COURT, SINGAPORE
CHAO HICK TIN J
[ADMIRALTY IN PERSONAM NO. 202 OF 1986]
31 JULY 1991

CONTRACT: *Offer and acceptance - When binding contract formed - Counter offer - Effect of a letter of intent - Agreement subject to contract - Variation order - Whether certain terms became part of the contract - Right to retain ownership of goods after delivery.*

The plaintiffs H, a German company specializing in the manufacture and supply of equipment and machinery for vessels commenced negotiations with the defendants S for the supply of such machinery; the representatives of H in Singapore were GS.

On 21 January 1984 GS made a quotation and on 1 March 1984, H made another offer to Selco Group whereby terms of payment were also specified. On the reverse side of the first page of the offer, there were set out in small prints in the German language various terms (the German Terms). On 3 April 1984, a revised offer was made; more revised offers were made on 11, 13 and 25 April 1984.

On 26 April 1984, the managing director of GS telexed to the defendants' managing director, confirming the price of DM1 million per set. A letter of intent was later issued by S for the purchase from H of two sets of deck machinery at DM880,000 per set. On 1 June 1984, H sent S an invoice for the first payment of 10%. On 6 July 1984, S obtained a bank draft for DM176,000 made payable to GS. On 12 July 1984, H issued their guarantee to S stating that the 10% payment will be refunded in the event that H failed to deliver the goods in accordance with the terms and conditions of purchase.

Meanwhile, on 6 July 1984, GS received the defendants' purchase order 70622. By 2 August 1984 GS had confirmed receiving detailed specifications and additional terms (the Addendum) sent by the defendants. Subsequently, at a date which is not certain, a variation order (VO 476) was issued in respect of purchase order 70622, the only material difference between the two being that VO 476 referred to the purchase price in German currency whilst purchase order 70622 referred to it in Singapore currency. On 23 July 1984, GS accepted VO 476 on behalf of H. In due course VO 477 was issued to replace purchase order 70622 and VO 476. The new variation order was necessary to comply with procedural requirements enabling H to obtain payment by drawing on letters of credit. PO 70622 and VO 477 contained provisions which stated that the order was subject to the terms and conditions on the face and reverse side. (Selco Terms).

The issues in dispute in this case are firstly, whether the contract to purchase the machinery was made at the time the letter of intent was issued or if not, whether it was made at any time before the issue of PO 70622; if not, when the contract was concluded and secondly whether the "German Terms" became part of the terms of the contract?

The crux of the dispute centres on Clause V(1) of the German Terms which provides that the supplier reserves the proprietary rights to the items of delivery until payment of all debts resulting from all the delivery agreements.

Held:

[1] All the negotiations between the parties and the agreements reached on various aspects were understood between the parties to be subject to proper contractual documentation. This explains why the defendants were always being pressed for a purchase order. There is no basis for the plaintiffs' contention that the parties were *ad idem* and that there was a binding contract on the issue of the letter of intent. Such a letter of intent is really a letter of comfort; to assure the other side that steps are being taken to obtaining the contract but is not a contract. Its only effect would be to enable the defendants to recover on a *quantum meruit* for work done pursuant to the direction.

[2] The plaintiffs' demand for the 10% payment was in truth a demand made in anticipation of the purchase order and towards account. Although a bank draft was obtained much earlier, the defendants did not deliver it to the plaintiffs until PO 70622 had already been issued. Therefore, no contract existed prior to the issue of this purchase order.

[3] Although PO 70622 was dated 28 June 1984 it was only despatched to GS on 6 July 1984. However, it was never expressly accepted by GS or the plaintiffs. VO 476 was accepted by GS on 23 July 1984. Therefore, a binding contract to sell and purchase the machinery was concluded only on 23 July 1984. The issue and acceptance by the plaintiffs of VO 477 does not in any way change the position that a contract was already concluded on 23 July 1984.

[4] On the evidence, the plaintiffs had accepted the defendants' purchase order subject to all the defendants' terms ("Selco Terms"). The question therefore is whether the two sets of terms (the defendants' terms and plaintiffs' terms) stand together side by side.

[5] In view of the conflicting nature of the Selco and German terms the only reasonable construction in the circumstances of the case is to treat VO 476 as a counter-offer which the plaintiffs have accepted. There is no evidence that the defendants have accepted the "German Terms". If the plaintiffs had wanted the "German Terms" to form part of the contract, it could and should have appropriately qualified its acceptance. It had failed to do it. Only one of the two sets of terms can prevail and that must be the Selco Terms which the plaintiffs had expressly accepted without any qualification.

[6] Therefore the "German Terms" are not part of the contract and the plaintiffs could not claim that it still retained ownership of the goods already supplied to the defendants. Nor are the plaintiffs entitled to sue for its return. Its only remedy is by way of proof of debt in the winding-up proceedings.

[Plaintiffs' claim dismissed with costs.]

Cases referred to:

British Steel Corp. v. Cleveland Bridge Co. [1984] 1 All ER 504 ***(cons)***
OTM Ltd. v. Hydranautics [1981] 2 Lloyd's Rep. 221 ***(cit)***
Butler Machine Tool Co. Ltd. v. Ex-Cell-O Corporation (England) Ltd. [1979] 1 WLR 401 ***(cons)***

For the plaintiffs - C Arul (Yoga with him)
For the defendants - Sarjit Singh Gill (Sim Bock Eng and Gan Kam Yuin with him)

JUDGMENT

Chao Hick Tin J:

The plaintiffs are a German company that specialize in the manufacture and supply of equipment and machinery for vessels. Sometime in early 1983 the Selco Group of companies, in particular its salvage division, Selco (Salvage) Pte. Ltd., proposed to acquire two new salvage tugs (subsequently known as hull Nos 308 and 309). International tenders were called for the same. The plaintiffs approached various Singapore shipyards which were likely to secure the contract to build the two salvage tugs. One of those whom the plaintiffs had discussions with were the defendants, Selco Shipyard Pte. Ltd. The plaintiffs hoped to be the suppliers of deck equipment and machinery for the two tugs. The plaintiffs' representatives in Singapore were and are Germarine Services (SEA) Pte. Ltd., which I will hereinafter refer to as Germarine Services.

On 21 January 1984 a quotation was made by Germarine Service on behalf of the plaintiffs to the defendants. On 1 March 1984, the plaintiffs made another offer (with attached specifications) addressed to Selco Group, Marine Salvage, for the attention of one Capt. Hancox. Prices were quoted for various items of equipment/machinery and services. Terms of payment were also specified. All these appear at PBI-28. On the reverse side of the first page of the offer, there were set out in small prints in the German language various terms (1DB2). I shall hereinafter refer to these terms as "the German Terms". According to one Mr. Nehus (PW1) the managing director of Germarine Services, these were the standard terms of the German Association of Machinery and Steel Structure Manufacturers. Subsequently, on 3 April 1984 the plaintiffs made a revised offer. On 11 April 1984, the plaintiffs made another revised offer, this time addressed to Selco Shipyard Pte. Ltd., for the attention of one Calvin Chow, the superintendent in the Estimation department, and the terms of payment were also specified. On the reverse side of the first page of the revised offers of 3 April 1984 and 11 April 1984, the German Terms also appeared. Before the offer of 11 April 1984, Nehus had a discussion with Calvin Chow in the latter's office on 6 April 1984. Two days later on 13 April 1984 Germarine Services telexed (reference number 135/84) more revisions on prices. A further discussion was held on 23 April 1984 and further modifications to the offer was made in a telex (reference number 150/84) dated 25 April 1984 from Germarine Services and marked for the attention of one Tay Kim Hock, the managing director of Selco Shipyard Pte. Ltd. and Calvin Chow. On 26 April 1984, Nehus telexed Tay Kim Hock to confirm a price of Deutsche Marks (DM) one million per set.

On 27 April 1984, Selco Shipyard issued a letter of intent to Germarine Services saying, after referring to "telex quotation 135/84 dated 13 April 1984, 150/84 dated 25 April 1984 and specification offer no. 5/5330C", that Selco Shipyard intended to purchase from the plaintiffs two sets of deck machinery at a total price of DM880,000 per set. It also set out certain terms and conditions relating to, *inter alia*, delivery schedule, penalty on delivery, guarantee, and payment terms.

On 1 June 1984, the plaintiffs wrote to Selco Shipyard enclosing an invoice asking for the first payment of 10%. The letter went on to explain in this way why the plaintiffs required the payment:

> The final technical specification has not yet been established, since there are still some technical details under clarification - see the various telexes exchanged. We assume that the final technical specification will be ready in about 2-3 weeks. This specification will be the

> basis for your formal written order. Immediately after receipt of your letter of intent we have started to work on this order, therefore, we think it is justified that you pay the 1st instalment already now due.

On 6 July 1984 Selco Shipyard obtained a bank draft for the sum of DM176,000 made payable to Germarine Services. Nehus said that this bank draft was collected by him a day or two later. However, I think he was mistaken because I see that (at PB58) on 12 July 1984, the plaintiffs wrote to the defendants enclosing a guarantee and asking for the first instalment:

> Re: Your SS No. 70622 dated 28 June 1984.
>
> Deck Machineries for Hull Nos. 308/309.
>
> As per your request please find the enclosed guarantee letter. Kindly remit the first instalment amounting to...

The guarantee issued by the plaintiffs stated that:

> In consideration of Selco Shipyard Pte. Ltd. ... having agreed to pay DM176,000 ... being 10% of the value of the purchase order no. SS 70622, we ... hereby guarantee to pay to the Shipyard the full sum ... in the event that the company fails to deliver the goods in accordance with the terms and conditions of the purchase as stated in purchase order no. SS 70622.

In the meantime, a purchase order no. SS 70622 dated 28 June 1984 (hereinafter referred to as PO 70622) was issued by Selco Shipyard to Germarine Services. However, it would appear that it was not despatched to Germarine Services until 6 July 1984 when it was sent out together with certain detailed specification and additional terms (hereinafter called "the Addendum") (1DB19-22). The date-stamp of Germarine Services (on 1DB18) shows that SS 70622 was received by Germarine Services on 6 July 1984. Nehus said that the Addendum did not come with PO 70622, nor with VO 476 or VO 477; these two latter documents will be described later. But he admitted that the Addendum was received by his office on 2 August 1984, as the date-stamp on the top right corner (PB54) shows. As I see it, the Addendum identified the technical details and set out certain terms (that is, on commissioning, warranty, price, payment and delivery) discussed and agreed upon in prior correspondence between the parties. The only reason Nehus gave for saying that the Addendum did not come with PO 70622 was the difference in the dates. As I have shown above, PO 70622 was only received by Germarine Services on 6 July 1984. So while PO 70622 was dated much earlier it was not sent out until the Addendum dated 5 July 1984 was ready. In any event, I do not think it is open to the plaintiffs to deny that the Addendum formed a part of the contract between the parties when they have in answer to a request for further and better particulars stated that the machinery supplied "(were) covered by ... the purchase order SS 70622 and the addendum to the said purchase order dated 5 July 1984 ...". Particulars furnished are part of the pleadings.

PO 70622 was stated to be subject to the terms and conditions on the face and the reverse side of the purchase order. It also provided that "the acceptance and execution of this order by you implies that you have accepted all the above conditions and in particular the conditions as set out on the back thereof". However, for reasons given below, PO 70622 was never accepted by Germarine Services. Between 27 April 1984 and 5 July 1984, there was correspondence of primarily a technical nature between the parties and the defendants' approvals were sought on various matters.

Subsequently, the precise date of which is not clear, a variation order no. 476 (VO 476) was issued in respect of PO 70622. It was also dated 28 June 1984. As I see it, the only material difference between the two documents is that whereas the PO 70622 referred to the purchase

price in terms of Singapore dollars, VO 476 referred to the purchase price in German Mark which was the currency in which the parties had negotiated and agreed upon. The terms specified on VO 476 are identical to those stated on PO 70622. On 23 July 1984 VO 476 was accepted by Germarine Services on behalf of the plaintiffs. I should mention here that under cross-examination, Nehus said that VO 476 was issued because no exchange rate was stated in PO 70622. Again Nehus' recollection failed him because on PO 70622 the applicable exchange rate was set out.

However, as agreed later between Selco Shipyard and Germarine Services, PO 70622 and VO 476 were cancelled. In their place a new VO 477 was issued in the name of and directly to the plaintiffs. It contained the same terms as VO 476. This switch was made because the second payment under the purchase had to be made by way of a letter of credit and the documentation had to be correct in order to enable the plaintiffs to draw on the letter of credit. VO 477 was accepted by the plaintiffs on 8 August 1984.

The issues that require determination are these. First, was the contract to purchase the two sets of deck machinery made on 27 April 1984 when the letter of intent was issued or, if not, was it made at any time before the issue of PO 70622. Second, if the answer to the first question is in the negative, then at which point in time was a binding contract concluded between the parties. Third, did the German Terms that appear on the reverse side of the quotations of 1 March 1984, 3 and 11 April 1984 form a part of the terms of the contract?

The crux of the dispute centres on Clause V(1) of the German Terms which provide that (as translated by the plaintiffs and not disputed by Counsel for the defendants) "the supplier reserves the proprietary rights to the items of delivery until payment of all debts resulting from all our delivery agreements". Nehus said that it was the custom of the trade that suppliers always reserved their rights to goods against payment. The significance of this clause is that if it did form a part of the contract then the plaintiffs are entitled to ask for the return, in particular, of the items of machinery supplied but which have not yet been installed on Hull 809 and in respect of which there are outstanding payments. If it did not, then the proprietary rights to the items of machinery would have passed to Selco Shipyard and as Selco Shipyard are now under liquidation, all that the plaintiffs could claim would be as an unsecured creditor of Selco Shipyard in respect of the payments still outstanding; the plaintiffs cannot ask for the return of those items.

First issue: Letter of Intent

The first issue concerns the letter of intent. It is not denied that before the issue of that letter, the parties had quite a few rounds of discussions and negotiations. Nehus explained that at the time when the letter of intent was given, he was pressing the defendants for a firm order as the plaintiffs were not prepared to get on with the work unless they got a firm order. He said that at the same time the local consultants of the defendants, Kenton Marine, were pressing him for the details of the deck machinery. Nehus had discussed with Tay Kim Hock and Calvin Chow. As a result the letter of intent was issued. Nehus said that he was told that the defendants had agreed to buy and needed time to issue the appropriate purchase order. Nehus asserted that there was already a contract between the parties at that stage.

It is clear to me that Nehus fully appreciated the critical need for a purchase order before there could be a contract. It seems to me that all the negotiations between the parties and the agreements reached on various aspects were understood to be subject to proper contractual documentation. That explains why he was pressing the defendants so hard for

the issue of a purchase order; yet the defendants were unable to accede to that demand. I therefore do not see how the plaintiffs could argue that the parties were *ad idem* and that there was a binding contract on the issue of the letter of intent. In my view the reason which the defendants gave, that they needed time to issue the purchase order, was just an euphemism that the defendants were not ready to commit themselves in law; perhaps certain internal procedures of the defendants had yet to be complied with. Such a letter of intent is really a kind of letter of comfort; to assure the other side that they are on the way of getting the contract or are almost there. But it is nevertheless not a contract.

I was referred to *British Steel Corp. v. Cleveland Bridge Co.* [1984] 1 All ER 504, where the letter of intent stated:

> ...we request that you proceed immediately with the works pending the preparation and issuing to you of the official form of sub-contract.

There the Court held that it did not constitute a contract as some material terms were still under negotiation. One may ask what would be the consequence of such a letter. I think the answer is provided by Parker J in *OTM Ltd. v. Hydranautics* [1981] 2 Lloyd's Rep 221 at 214 where he said:

> ...its only effect would be to enable the defendants to recover on a quantum meruit for work done pursuant to the direction.

In *OTM Ltd.,* the buyer expressly asked the seller "to proceed with the tensioner fabrication on the basis of this telex". In the absence of such an express direction, it is a matter of construction from the circumstances of a case whether there was such a direction and consequently a liability to pay on *quantum meruit.*

Subsequent to the issue of the letter of intent, further discussions were held between the parties, but they were mainly of a technical nature. The only significant development was the demand by the plaintiffs of the first payment of 10%. If, as contended by the plaintiffs that by virtue of the letter of intent there was already a firm contract, then the demand needed only refer to the contract, as the basis of the demand. Why then did the plaintiffs explain the demand in this way:

> Immediately after receipt of your letter of intent we have started to work on this order, thereupon, we think it is justified that you pay the first instalment now.

In truth, the demand was really made in anticipation of the purchase order and towards account. Further, what was just as significant was that the defendants did not make arrangements to effect payment of the 10% until 6 July 1984 and the bank draft of that date which the defendants obtained was not delivered to the plaintiffs or their agents in Singapore until on or after 12 July 1984, by which time PO 70622 had already been issued. Accordingly, I hold that no contract was concluded between the parties prior to the issue of PO 70622.

Some reliance was placed by the plaintiffs on a telex of 21 May 1984 from the defendants, to say that the contract was already in existence. This telex dealt with various technical matters and ended with an item 10 reading as follows:

> Item 10 - Purchase Order
> Considering that you will agree to our above remarks and we herewith confirm the technical specification and the latest commercial terms and conditions to which we agreed on 27 April 1984 (refer to the letter of intent). Awaiting for your final written specification in due time.

I am afraid I do not share the views of the plaintiffs as to the purport of this item. This item merely provided an update of the position as regards the question of the issue of the purchase order. It nowhere dispensed with the need for a purchase order nor could it be construed to mean that the defendants were already committed to the contract.

Second Issue: When Was The Contract Concluded?

The next issue which I have to determine is this: when was the contract to purchase the two sets of deck equipment and machinery concluded between the parties? Now PO 70622 was dated 28 June 1984 and issued in favour of Germarine Services. As I have said, it was only despatched to Germarine Services on 6 July 1984. But it was never expressly accepted by either Germarine Services or the plaintiffs. Subsequently, on a date that is not clear as there is no evidence on that, VO 476 was issued to replace PO 70622. As stated above, the reason for the issue of VO 476 was that in PO 70622 the contract sum was wrongly stated to be S$1,372,800 when it should have been DM1,760,000. VO 476 was accepted by Germarine Services on behalf of the plaintiffs on 23 July 1984. Therefore, I hold that the contract to sell and purchase was concluded between the parties on 23 July 1984.

Before I leave this second issue, I ought to refer to VO 477. On the evidence and as explained by Nehus, VO 477 was issued for a technical reason, that is, to facilitate the issue of and payment under a letter of credit which was the mode agreed upon for the second payment under the contract. It was necessary that the purchase order should be made out in the name of the plaintiffs rather than the name of Germarine Services. I do not think the issue and acceptance by the plaintiffs of VO 477 in any way changes the position that a contract was already concluded on 23 July 1984. This switch was truly a matter of form.

Third Issue: Terms Of The Contract

It will be recalled that the first quotation made by the plaintiffs to the defendants was on 21 January 1984. On this quotation, no reference was made to the German Terms. Then on 1 March 1984, the plaintiffs gave a quotation on their letterhead which on the reverse side of the page were the German Terms. On 3 April and 11 April 1984 when further revised quotations were made, the German Terms also appeared on the reverse side of the first page. The third issue before me is whether the German Terms, in particular Clause V(I), also formed a part of or was incorporated into the contract concluded on 23 July 1984.

First, let me refer to two very pertinent provisions that appear on the face of VO 476 (and on PO 70622 and VO 477 as well):

(1) This order is subject to the terms and conditions on the face and reverse side hereof.

(2) The acceptance and execution of this order by you implies that you have accepted all the above conditions and in particular the conditions as set out on the back hereof.

The plaintiffs had accepted the order by signing at the appropriate column. They had therefore accepted all the Selco Terms.

Clause 2 of the Selco Terms provides that:

> ...this form when properly executed on behalf of purchase and bearing its order number, is the only form which will be recognized by the purchaser as authority for charging merchandise ... to its account.

The last paragraph of the Addendum reads:

> Notwithstanding any terms indicated elsewhere the price and delivery terms shall be as stated in the purchase order and shall not be subject to any change without the written consent by the Yard.

In contrast, Clause I(4) of the German Terms, as translated, is as follows:

> We are not bound by the purchasing conditions of the buyer, also in the event that we have not specifically objected to them.

So the question is whether, having regard to these provisions, these two sets of terms could stand side-by-side; the plaintiffs assert in the affirmative.

In a case of this kind, precedents can only be referred to as guides and nothing more. A case which, in several material respects, resembles our case here is *Butler Machine Tool Co. Ltd. v. Ex-Cell-O Corporation (England) Ltd.* [1979] 1 WLR 401. I will take the facts from the headnote of the report:

> On 23 May 1969, the plaintiff sellers offered to deliver a machine tool for the price of £75,535. Delivery was to be in 10 months and it was a condition that orders were accepted only on the terms set out in the quotation which were to prevail over any terms in the buyers' order. The sellers' terms included a price variation clause whereby it was a condition of acceptance that goods would be charged at prices ruling at date of delivery. The defendant buyers replied on 27 May 1969, giving an order with differences from the sellers' quotation and with their own terms and conditions which had no price variation clause. The order had a tear-off acknowledgment for signature and return which accepted the order 'on the terms and conditions thereon'. On 5 June 1969, the sellers, after acknowledging receipt of the order on 4 June, returned the acknowledgment form duly completed with a covering letter stating that delivery was to be 'in accordance with our revised quotation of 23 May for delivery in ... March/April 1970'.
>
> The machine was ready about September 1970, but the buyers could not accept delivery until November 1970. The sellers invoked the price increase clause and claimed £2,892 for the increase due to the rise in costs between 27 May 1969, and 1 April 1970, when the machine should have been delivered...

Thesiger J gave judgment for the sellers because he felt that the price variation clause in the sellers' form continued through the whole dealing and that the sellers were entitled to rely upon it. Neither party called any oral evidence. The Court of Appeal reversed the High Court decision and held that the buyers' order of 27 May 1969 was not an acceptance of the offer in the sellers' quotation of 23 May but a counter-offer which the sellers had accepted by their letter of 5 June 1969 when the contract was complete without any price limitation clause. Denning MR gave this reason in arriving at that conclusion:

> But I think that the documents have to be considered as a whole. And as a matter of construction, I think the acknowledgment of 5 June 1969, is the decisive document. It makes it clear that the contract was on the buyers' terms and not on the sellers' terms: and the buyers' terms did not include a price variation clause.

In my view Clause 2 of the Selco Terms and the last paragraph of the Addendum are clearly inconsistent with Clause I(4) of the German Terms. Only one of the two sets of terms can prevail and that must be the Selco Terms which the plaintiffs had expressly accepted without any qualification. As I see it, the only reasonable construction in the circumstances of the present case would be to treat VO 476 as a counter-offer, which the plaintiffs had accepted.

On the other hand, there is no evidence at all that Selco Shipyard had accepted the German Terms. If the plaintiffs had wanted the German Terms to also form a part of the contract, they could and should have appropriately qualified their acceptance. This they had failed to do. In fact Nehus in his evidence agreed that the plaintiffs were keen to have the contract. In Germarine Services' telex of 25 April 1984, they had also said so.

For the foregoing reasons, I am afraid it is not open to the plaintiffs to contend that the German Terms formed a part of the contract or, at the very least, that Clause V of the German Terms was incorporated into the contract. Of course, there are also other material differences between the two sets of terms, for example, relating to packing, withholding of payment, termination of contract, passing of risk and rejection of defective material, which militate against any possible reconciliation of the two without doing violence to either or both.

In passing, I would just mention these. The quotations of 1 March 1984, 11 April 1984 and 13 April 1984 had all commenced with a printed sentence in German and this Court was not told what is the meaning of that sentence. The plaintiffs, through Nehus, had been conducting negotiations with the defendants in English. In his evidence, Nehus indicated that he did not bring the German Terms to the attention of the officers of the defendants. However, he did say that the Selco Group Chief Executive then was one Kahlenberg, who was a German. But it was quite clear that Kahlenberg never discussed with him, even generally, the terms of the contract. There was no evidence that Kahlenberg ever saw the quotations.

In the result I dismiss the plaintiffs' claim that they still retain ownership of the specified articles supplied by them to the defendants for the purposes of Hull 309; the plaintiffs are not entitled to a return of the same. The outstanding sum owing by the defendants to the plaintiffs on that account can only be recovered by the plaintiffs by way of proof of debt in the winding-up proceedings. The plaintiffs shall bear the costs of this action.

Also found at [1991] 3 CLJ 2289